Nos. 89-1391, 89-1392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

v.

DR. LOUIS W. SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

v.

DR. LOUIS W. SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR *AMICI CURIAE* AMERICAN LIBRARY ASSOCIATION, FREEDOM TO READ FOUNDATION, PEOPLE FOR THE AMERICAN WAY, NATIONAL EDUCATION ASSOCIATION, THE NEWSPAPER GUILD, NATIONAL WRITERS' UNION, AND FRESNO FREE COLLEGE FOUNDATION SUPPORTING PETITIONERS

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July 27, 1990

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

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INTEREST OF AMICI

The American Library Association ("ALA") was founded in 1876 as a nonprofit, educational organization committed to preservation of the library as a resource indispensable to the intellectual, cultural, and educational welfare of the Nation. ALA is the oldest and largest library association in the world and the chief voice of the modern library movement in North America. ALA's membership includes more than 3,000 libraries and more than 47,000 individuals, primarily librarians. Many of ALA's member libraries are, and many of its member librarians serve, state or federally subsidized institutions.

The Freedom to Read Foundation ("Foundation") is a non-profit organization established in 1969 by ALA to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; to support the right of libraries to include in their collections and make available to the public any work they may legally acquire; and to set legal precedent for the freedom to read of all citizens.

The second article of the Library Bill of Rights, adopted by the ALA Council and subscribed to by both of these *amici*, is pertinent to the regulations at issue:

> "Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval."

The Secretary's regulations governing Title X programs transgress this non-discrimination principle by prohibiting health care professionals and other Title X personnel—some in libraries and educational resource centers—from discussing abortion, providing patients with information about abortion, or providing referrals to clinics offering abortion counseling and services.

People for the American Way is a nonpartisan, education-oriented citizen's organization established to promote and protect civil liberties and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to the Nation's heritage of tolerance and pluralism, People for the American Way now has 290,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of the democratic tradition and to defend it against attacks from those who would seek to limit our fundamental freedoms, particularly our First Amendment rights.

The National Education Association (NEA) is a nationwide employee organization with a current membership of over two million members, the vast majority of whom are employed by public educational institutions. NEA operates through a network of affiliated organizations; it has state affiliated organizations in each of the 50 States and approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. One of the principal purposes of NEA and its affiliates is to protect the constitutional rights of educational employees, including their First Amendment right of free speech.

The Newspaper Guild (AFL-CIO, CLC) is a labor union representing some 40,000 employees of newspapers, magazines, wire services and related enterprises in the United States, Canada, and Puerto Rico. It has been actively involved in protecting the First Amendment rights of its members and all Americans.

The National Writers' Union (NWU) is a seven-year old organization dedicated to improving wages and working conditions for writers as well as fighting for free speech issues that have an impact on NWU's members. Representing 3,000 writers nationwide, some of whom work for publicly-funded agencies, the NWU views with deep concern any attempt, by governmental regulation or

other means, to restrict free speech or to control the flow of information.

The Fresno Free College Foundation is a community organization with offices in Fresno, California. It was founded in 1968 in connection with an academic freedom case. Since then, it has, in various ways, supported academic freedom and the civil liberties of students, professors, and citizens, and the preservation of a free and open society through free inquiry and the free expression of ideas.

These *amici*—active supporters and defenders of First Amendment rights—share a strong interest in ensuring that the public has access to an unbiased and uncensored flow of information. In addition, *amici*—some of whose members are recipients of public funding—have a vital interest in protecting recipients of public funds from censorship through the power of the purse.

The parties have consented to the filing of this *amici curiae* brief. Their letters of consent are on file with the Clerk of this Court.

INTRODUCTION

The Department of Health and Human Services has promulgated regulations that prohibit recipients of Title X funds from providing information to their patients about abortion and from providing abortion counseling of any kind. 42 C.F.R. §§ 59.1 *et seq.* *Amici* strongly agree with the First Circuit that these regulations violate the First Amendment. *Commonwealth of Massachusetts v. Secretary of Health & Human Services*, 899 F.2d 53 (1st Cir. 1990). The Second Circuit, however, has upheld these regulations. *State of New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989).

The importance of the constitutional principles at issue is dramatized if they are considered in the context of

America's publicly-funded libraries.[1] Libraries are essential to the intellectual, cultural, and educational welfare of the Nation precisely because they make available to the public the full spectrum of information and opinion without censorship based upon authors' views. Libraries *per se* do not express opinions, but they do, without favoritism, make available books, magazines, and other materials that express opinions, often in very strong terms. Thus, a library would not advocate abortion. But if asked by a pregnant woman wanting information about abortion, about the options available to her, or about places where she might obtain an abortion, a library would provide her the materials she seeks. Such materials might well "counsel" or even advocate abortion in particular circumstances (or counsel against or discourage abortion). In this respect, the role of the library is comparable to that of a physician or other health care provider, among whose responsibilities is providing information about medical choices sought by patients.

Fulfillment of this function by libraries is crucial to the flourishing "marketplace of ideas" celebrated in this Court's fundamental First Amendment jurisprudence. But despite the tradition of "freewheeling inquiry" in America's libraries, *Board of Educ. v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting), libraries occupy a perilous niche in our society: most of our libraries are publicly-funded institutions subject to state control not only through the police power but also through the power of the purse.[2] If not insulated by the First Amendment

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[1] An identical point could be made if subsidized colleges or universities, or public school systems, were considered.

[2] Funding for public libraries through the Library Services and Construction Act alone exceeds one hundred million dollars. *See generally* Library And Book Trade Almanac, at 280-310 (35th ed. 1990-91). Similarly, federal and state governments expend billions of dollars to fund universities, colleges, public schools, art programs, publicly owned theatres, and public broadcasting. The potential to skew public opinion—if government is permitted to

from viewpoint-based manipulation of public funds, as well as from viewpoint-censorship administered in the more traditional form of regulations and criminal laws, the precious tradition of free inquiry and discovery safeguarded and promoted by America's libraries, as well as its schools and other institutions, will become a thing of the past.

If the Secretary may constitutionally prohibit doctors and other health professionals in subsidized family planning clinics from providing abortion counseling, abortion referrals, and all information about abortion—despite the tradition in these professions of unfettered expression of professional judgment in the patient's best interest—then government may also prohibit libraries and other institutions dependent on public funding from making that same information available in material maintained on library shelves.[3] And if these regulations survive constitutional review, federal and state governments will be free to impose unabashed viewpoint-based discrimination on other institutions, essential to the Nation's system of free expression, that receive public funds —such as colleges, universities and public school systems.

Censorship of information that can be dispensed by health care professionals, libraries or other public insti-

condition receipt of funds on propounding one point of view—is almost unlimited and extremely dangerous.

[3] Indeed, Title X recipients with libraries or educational resource centers to which their patients have access are *directly* subject to the regulations. For instance, Planned Parenthood Association of Utah (a plaintiff in a similar case pending before the Tenth Circuit) has an Educational Center, funded by Title X, that houses a library containing books, films and publications covering a broad spectrum of topics related to family planning that also mention or discuss abortion. *Planned Parenthood Fed'n of Am. v. Bowen, appeal pending*, No. 88-7251 (10th Cir.), Brief of Plaintiffs-Appellees, at 5 (Dec. 22, 1988). Presumably, Title X prohibits this library from lending books, pamphlets or other information regarding abortion to patients or individuals who request them.

tutions also compromises the First Amendment rights of the patients and other individuals seeking access to such information. Individuals dependent on public institutions for information on matters of public concern should not be denied access to competing points of view because of governmental disapproval of those views.

There can be no doubt that viewpoint censorship would compromise the traditional function of libraries and other institutions that receive public funds—just as the regulations at issue compromise the traditional function of health care professionals in the regulated clinics. Unless this Court strongly reaffirms the principles, directly at stake here, that government may not discriminate based upon *viewpoint* in dispensing subsidies for expressive activities, and that government may not *penalize* a speaker for the *privately*-funded exercise of his or her constitutional right to speak, there will be a serious diminution in the quality of information available, not only to impoverished pregnant women, but to all Americans.

SUMMARY OF ARGUMENT

Above all else, the First Amendment forbids government from discriminating among speakers and speech on the basis of viewpoint. Thus, officials may neither manipulate access by the public to government-owned expressive forums in order to advance or disadvantage particular points of view, nor manipulate subsidies for expressive activity for that improper end. The Secretary's Title X regulations discriminate for purely political reasons against pro-abortion viewpoints and in favor of anti-abortion viewpoints, without regard for regulated health-care professionals' judgment about which information and counseling would be in their particular patients' best interests. This viewpoint-based discrimination is just as unconstitutional as would be viewpoint-based restrictions on a public library's collection or on the history curriculum at a private university that accepts federal subsidies. Point I.

Even if the regulations were deemed to be viewpoint-neutral, they nevertheless violate the First Amendment by banning discussion by health care professionals and their patients of a topic—abortion—directly and inextricably bound to the treatment and related discourse authorized by Title X. Point II.

Moreover, it is well-established that government may not deny a subsidy as a consequence of disfavored *privately*-funded speech. By prohibiting Title X recipients from providing information about abortion, except at separate facilities with separate personnel, and by forbidding Title X recipients from referring family-planning patients to the separate facility if the "principal" business at that facility is providing abortion, the regulations unreasonably interfere with and deter protected expression. This penalty on privately-funded speech about abortion violates the First Amendment. Point III.

ARGUMENT

I. THE SECRETARY'S PROHIBITION ON DISCUSSION, COUNSELING AND REFERRAL FOR ABORTION SERVICES CONSTITUTES VIEWPOINT DISCRIMINATION VIOLATIVE OF THE FIRST AMENDMENT.

The First Amendment and the Equal Protection Clause of the Fourteenth Amendment generally forbid government from considering or acting on the basis of the *content* of constitutionally protected expression. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-31 (1987); *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972). Even in the few narrow circumstances in which this general principle does not apply fully,[4] this

[4] *See, e.g., Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 805 (1985) ("nonpublic forum" for communicative activities); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (zoning for adult theaters).

Court has preserved the "essence" of the content-neutrality rule by demanding "*absolute neutrality* by the government" with respect to "*the point of view* being expressed." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976) (emphasis added). Above all else, the First Amendment requires that government not discriminate on the basis of viewpoint.[5]

Viewpoint-based discrimination—which strikes "at the very heart of constitutionally protected liberty"[6]—has been forbidden in a broad array of contexts.[7] In public

[5] *See, e.g., Cornelius*, 473 U.S. at 806 ("the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses"); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) (Easterbrook, J.) ("The state may not ordain preferred viewpoints. . . . The Constitution forbids the state to declare one perspective right and silence opponents."), *aff'd*, 475 U.S. 1001 (1986).

[6] *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959).

[7] *See, e.g., Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *id.* at 284 (Frankfurter, J., concurring) (access to public parks); *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 511 (1969) (expression by students in public school); *see Young v. American Mini Theatres, Inc.*, 427 U.S. at 64, 67, 70 (zoning restrictions on adult motion picture theaters); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986) (same); *Members of the Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding an ordinance prohibiting the posting of signs on public property because the ordinance was viewpoint-neutral); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring) (a law "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law abridging the freedom of speech' "), quoted with approval, *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984); *Carey v. Brown*, 447 U.S. 455 (1980) (residential picketing); *City of Madison, Joint School Dist. v. Wisconsin Employment Relations Comm'n.*, 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views . . . is

schools, perhaps uniquely among governmental institutions in the United States, the inculcation of values is an express and legitimate purpose. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988). But in *Board of Educ. v. Pico*, 457 U.S. 853 (1982), which involved a public school library, although the Justices disagreed about the *application* of the viewpoint-neutrality principle to the particular facts of that case, at least *eight* Justices recognized that the First Amendment is infringed if officials remove books from a public school library based upon the officials' disagreement with the ideas expressed in those books.[8] Thus, so antithetical is governmental viewpoint discrimination to the core values of a free society that this Court has rejected it even in the context of public school libraries.

Lower courts, both before and after *Pico*, have also held that viewpoint discrimination is forbidden in public

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the antithesis of constitutional guarantees."); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986) (prohibiting viewpoint discrimination in funding of the books for the blind program of Library of Congress).

[8] *See Pico*, 457 U.S. at 871 (Brennan, J., joined by Marshall, J., Blackmun, J., and Stevens, J.) ("If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution") (emphasis in original); *id.* at 877 (Blackmun, J.) ("the State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficiently compelling reasons") (emphasis in original); *id.* at 883 (White, J., concurring in the judgment) ("the reason or reasons underlying the school board's removal of the books" is "a material issue of fact that precluded summary judgment" in school board's favor); *id.* at 919 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting) (agreeing that Constitution does not permit the official suppression of ideas; in the public school context, " 'the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible' ").

school libraries.[9] Prohibitions on viewpoint discrimination in the context of a school library are entirely appropriate; the school library is an indispensable complement to the student's education by supplementing with a variety of viewpoints the more directed curriculum of educators. And because viewpoint discrimination is prohibited in public *school* libraries, the ban on viewpoint-based discrimination applies *a fortiori* to public libraries and private libraries and educational resource centers receiving public funding.[10]

Indeed, there are numerous decisions prohibiting viewpoint discrimination when government aids private speech *outside* the school context. Specifically, the Court has consistently recognized that permitting viewpoint-based discrimination when government aids or facilitates expression by private citizens or organizations would pose

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[9] *See, e.g., Minarcini v. Strongville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *Sheck v. Baileyville School Comm.*, 530 F. Supp. 679 (D.Me. 1982); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978); *Cf. Pratt v. Independent School Dist.*, 670 F.2d 771 (8th Cir. 1982) (motion picture); *Brown v. Board of Regents*, 640 F. Supp. 674 (D. Neb. 1986) (same); *Bell v. U-32 Bd. of Educ.*, 630 F. Supp. 939 (D. Vt. 1986) (school play). *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), is not to the contrary; in that case this Court relied heavily on the value-inculcative role of public schools in controlling *curriculum*. *See, e.g., id.* at 271-72.

[10] Such libraries are unequivocally places for "freewheeling inquiry," *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting), and quintessentially government forums for the free communication of *all* ideas. Viewpoint censorship in the publicly-funded library violates the rights of both speaker and listener. Library users have a fundamental right of access to information free from governmental viewpoint censorship. *Cf. Pico*, 457 U.S. at 866-67 (Brennan, J.); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Martin v. Struthers*, 319 U.S. 141, 143 (1943). Patients in public health programs have similar interests.

intolerable dangers to free expression. Thus, when bestowing "seals of approval," *see, e.g., Healey v. James*, 408 U.S. 169, 187 (1972), government must be viewpoint neutral. And directly pertinent to the present case, viewpoint-based discrimination is also prohibited in government-created "non-public" forums for expression, and in government programs subsidizing private speech. Prohibiting governmental viewpoint discrimination in Title X family planning clinics is required by these precedents and *essential* to the preservation of a free marketplace of ideas and the perpetuation of a system of expression that is free from official orthodoxy.

Where government facilities are lent to private speakers, the Constitution invariably prohibits discrimination that is in reality an effort "to suppress expression merely because public officials oppose the speaker's view." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *see Cornelius*, 473 U.S. at 800, 806-13. For the same reasons, the First Amendment also prohibits viewpoint discrimination in subsidy programs. *Subsidizing* speech activity, like providing a *place or an audience* for a speaker, involves granting government property (money or land) to support speech by private parties. For all relevant purposes, a government program subsidizing a speech activity is a program that creates a (non-public) government forum. Identical interests are present in both subsidy and government property cases: the individual's interest in reaching an audience with the assistance of government, and government's interest in ensuring that its property is preserved for its intended use. Identical dangers to First Amendment interests are posed if government uses its property—whether real estate or money—to benefit or disadvantage particular viewpoints, or individuals with particular points of view.[11]

[11] It is clear that the viewpoint-neutrality rules apply to government forums whether or not they have a physical situs. *See Cornelius*, 473 U.S. at 800-801; *see also Perry Educ. Ass'n, supra* (holding that school's internal mail system was a forum notwithstanding that an internal mail system lacks physical situs); *Bolger v. Youngs Drug Prods. Co.*, 463 U.S. 60 (1983) (applying public forum analysis to the United States mails).

It is also clear that the viewpoint-neutrality requirement applies equally to government forums in which government subsidizes private speech. For example, the Combined Federal Campaign ("CFC") at issue in *Cornelius* involved a subsidy, and the Court of Appeals for the District of Columbia Circuit nevertheless applied forum analysis. *NAACP Legal Defense and Educ. Fund, Inc. v. Devine*, 727 F.2d 1247, 1254, 1255-56 (D.C. Cir. 1984), *rev'd on other grounds, Cornelius, supra*. In *Cornelius*, this Court did not even mention the fact that the CFC involved a subsidy, while holding that it was a nonpublic forum. Many lower courts have applied forum analysis in the context of a government subsidy. *See, e.g., Bazaar v. Fortune*, 476 F.2d 570 (5th Cir.), *mod. on other grounds*, 489 F.2d 225 (1973) (*en banc*), *cert. denied*, 416 U.S. 995 (1974); *Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971).

This Court has repeatedly made clear that although government has no obligation to subsidize speech in the first place, if it *chooses* to subsidize speech it may not discriminate on the basis of the viewpoint expressed. In fact, the tax subsidy decisions of this Court suggest that even viewpoint-neutral *content* discrimination is impermissible when government subsidizes speech. *See* Point II, *infra*.[12] The outer contours of the prohibition on any *content*-based restrictions may be unclear, *see infra*, but it is indisputable that the government may not discriminate on the basis of the *viewpoint* of the speaker. In *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946), for example, this Court ruled that the Postmaster General could not deny second-class mailing privileges to publications he considered "morally improper." Such a denial, the Court held, would be "abhorrent to our traditions," and raise "grave constitutional questions." *Id.* at 151,

[12] There is no material distinction between a tax subsidy and a cash subsidy for purposes of determining access to a government forum and for applying the rule of viewpoint neutrality. *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983).

155-56. *See United States ex rel. Milwaukee S.D. Pub. Co. v. Burleson*, 255 U.S. 407, 431 (1921) (Brandeis, J., dissenting) (viewpoint-based denial of a subsidy unconstitutional; claim that such a denial did not infringe constitutional rights termed "technical and insubstantial").

More recently, in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), this Court considered whether a complicated tax scheme that permitted veterans' groups to use tax-deductible contributions for lobbying activities but denied other tax-exempt organizations this privilege, violated the First and Fifth Amendments. The Court concluded that the distinction did not violate the Constitution because the disparate treatment of organizations was not based upon the other organizations' views or the content of their speech. The Court warned, however, that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas.'" *Id.* at 548. Thus, the Court upheld the tax scheme only because there was "no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." *Id. Regan* strongly suggests that viewpoint-based discrimination in subsidy programs is forbidden by the First Amendment. *Cf. Cornelius*, 473 U.S. at 800, 806-13 (same standard in government forum cases). Post-*Regan* opinions reaffirm the prohibition of viewpoint discrimination in subsidy cases.

In *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986), for example, the Court struck down a statute that subsidized only one side of a debate, because "[t]his kind of favoritism goes well beyond the fundamentally content-neutral subsid[y] that we sustained in . . . *Regan*," *id.* at 14-15. The Court distinguished *Regan* and other cases upholding viewpoint-*neutral* denials of certain subsidies.

Dissenting in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), Chief Justice (then Justice) Rehnquist, the author of *Regan*, reemphasized the principle that viewpoint restrictions may not be imposed by the government when it subsidizes speech. The Chief Justice cautioned that any restrictions on the government's subsidies must not be "'aimed at the suppression of dangerous ideas,'" *id.* at 407 (*quoting Cammarano v. United States*, 358 U.S. 498, 513 (1959)). He argued that the FCC subsidy should have been upheld because it was "strictly neutral" and "[i]n no sense [could] it be said that Congress ha[d] prohibited only editorial views of one particular ideological bent." *Id.* at 407. Similarly, dissenting in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987), Justice Scalia argued that the tax subsidy at issue should have been upheld notwithstanding its *content*-based discrimination, but he indicated that viewpoint discrimination in subsidy programs would violate the First Amendment: "Perhaps a more stringent, prophylactic rule is appropriate, and can consistently be applied, when the subsidy pertains to the expression of a particular viewpoint on a matter of public concern . . . ." [18]

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[18] Information relating to abortion is clearly a matter of *public concern*, particularly in light of the bitter and controversial nature of the public debate surrounding abortion issues.

The lower courts have ruled viewpoint-based discrimination to be unconstitutional in subsidy cases outside the abortion-related context. *See, e.g., Big Mama Rag, Inc. v. United States*, 631 F.2d 1034 n.7 (D.C. Cir. 1980); *Esquire, Inc. v. Walker*, 151 F.2d 49, 50 (D.C. Cir.), *aff'd on other grounds sub nom. Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Brown v. Board of Regents*, 640 F. Supp. 674 (D. Neb. 1986); *American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D.D.C. 1986); *Spencer v. Herdesty*, 571 F. Supp. 444 (S.D. Ohio 1983); *Greenberg v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Toward A Gayer Bicentennial Comm. v. Rhode Island Bicentennial Foundation*, 417 F. Supp. 632 (D.R.I. 1976); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Brooks v. Auburn Univ.*, 296 F. Supp. 188 (M.D. Ala.),

The Secretary's regulations clearly impose viewpoint-based restrictions on the speech of Title X recipients. If a health care professional in a clinic is asked a direct question about abortion by a pregnant patient, the regulations prohibit the professional from providing any information whatsoever, from referring her to a source of information about abortion, and from encouraging abortion in any other way. 42 C.F.R. § 59.8(b)(4). The regulations further instruct that the professional may only respond: "[t]he project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." *Id.* at § 59.8 (b)(5). This is viewpoint-based discrimination.

In addition, the regulations *mandate* the provision of "information necessary to protect the health of mother and *unborn child* until such time as the referral appointment is kept." *Id.* at § 59.8(a)(2) (emphasis added).[14] They *mandate* inclusion on any referral list of "providers who do *not* provide abortions." *Id.* at § 59.8(a)(3) (emphasis added). But the regulations *prohibit*: provision of "counseling concerning the use of abortion as a method of family planning or . . . referral for abortion," § 59.8 (a)(1); provision of a referral list including programs

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aff'd, 412 F.2d 1171 (5th Cir. 1969); *Smith v. Tennessee*, 300 F. Supp. 777 (E.D. Tenn. 1969).

This Court's opinions in *Lyng v. International Union*, 485 U.S. 360 (1988), *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), are not in conflict with this principle. None of those cases dealt with a viewpoint-based restriction on First Amendment rights. The First Amendment claims rejected in *Lyng* were not that the denial of the subsidy was based upon viewpoint, but rather that denial indirectly affected associational rights, forcing alteration of family relationships to continue to receive food stamp benefits. Likewise, *Maher* and *Harris* were concerned with the denial of public funds for abortion, not with restrictions on expressive activity about abortion.

[14] Thus, the regulations mandate provision of prenatal counseling, encouraging the woman to carry the fetus to term.

"whose principal business is provision of abortion," § 59.8(a)(3); and development or dissemination "in any way" of "materials (including printed matter and audio-visual materials) advocating abortion as a method of family planning." § 59.10(b)(5).

Without question, the Secretary has prohibited views "of one particular ideological bent," *League of Women Voters*, 468 U.S. at 407 (Rehnquist, J., dissenting), and has mandated communication of his own ideological perspective on the medical issues facing doctors and their pregnant patients. Indeed, in suppressing certain views and information while compelling *anti*-abortion speech and referrals, the regulations create an official orthodoxy with regard to discussion of abortion, wholly inimical to the "fixed star in our constitutional constellation . . . that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943).

The viewpoint-based discrimination at issue here is particularly repugnant to the First Amendment for three reasons. First, the restriction is wholly unrelated to the traditional functions performed by health care personnel in programs such as those funded under Title X. The basic purpose of such programs is to provide citizens of limited means with the benefits of the expertise and judgment of professionals that is not otherwise within their reach. Health care professionals have a noble tradition and ethical rules of longstanding requiring members to provide information and counsel in the patient's best interest. Restricting professionals' freedom to provide information or advice they believe, in their professional judgment, is in their patients' best interests—and prohibiting them from providing information specifically requested by their patients—seriously undermines that tradition.

Second, prohibitions based not on the medical or health-related views of the government, but on "politics," is particularly indefensible. *See State of New York v. Sullivan*, 889 F.2d 401, 418 (2d Cir. 1989) (Kearse, J., dissenting) (quoting government counsel from transcript of oral argument).[15]

Third, viewpoint discrimination in a program of central importance to poor women threatens "suppression of . . . ideas," *Regan*, 461 U.S. at 548, to an extent far greater than that entailed in the typical speech-subsidy program. For many poor women, there may be no realistic alternative to Title X-funded family planning programs.[16] Prohibiting a pregnant woman from receiving at the Title X clinic information the Secretary deems politically undesirable, and prohibiting the clinic from referring her to another program that *would* provide that information, would either deny her access to that information, or delay access until it is too late for her to act on it. *State*

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[15] The First Amendment "command[s] the conclusion that the [government] may not act to deny access to an idea simply because . . . officials disapprove of that idea for partisan or political reasons." *Pico*, 457 U.S. at 879 (Blackmun, J., concurring in part and concurring in the judgment). *Any* viewpoint restriction on public libraries would be inconsistent with their function as facilitators of "freewheeling inquiry," *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting). And any viewpoint restrictions on professors at universities receiving federal grants would similarly be inconsistent with the historic role of universities as places of unfettered discourse and inquiry and the tradition of academic freedom. *See Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Weiman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). Neither such restrictions, nor the regulation at issue here, could possibly survive the strict judicial scrutiny appropriate to laws restricting speech.

[16] Ninety percent of the patients utilizing Title X programs have incomes substantially below the poverty line. *Commonwealth of Massachusetts v. Secretary of Health & Human Services*, 899 F.2d 53, 56 (1st Cir. 1990).

of New York v. Sullivan, 889 F.2d 401, 417 (2d Cir. 1989) (Kearse, J., dissenting).

II. EVEN VIEWPOINT-NEUTRAL EXCLUSION OF SPEECH ABOUT A PARTICULAR SUBJECT MATTER FROM GOVERNMENT SUBSIDY PROGRAMS VIOLATES THE FIRST AMENDMENT, WHERE, AS HERE, THAT EXCLUSION IS INCONSISTENT WITH THE TRADITIONAL FUNCTION OF THE SUBSIDIZED PROGRAMS AT ISSUE.

Government censorship of subsidized programs may be constitutionally objectionable even if *not* viewpoint-based. The Court has held that *content* discrimination is unlawful in the context of a tax subsidy program. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-231 (1987). *Ragland* holds that a State may not—consistent with the principles of the First Amendment—provide a tax exemption based on the *content* of a magazine. Such selective taxation is "particularly repugnant to First Amendment principles [because] a magazine's tax status depends entirely on its *content*." *Id.* at 229 (emphasis in original). In the subsidy context, therefore, "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an *entire topic*." *Id.* at 230 (emphasis added), *quoting Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 537 (1980).

Applied directly to this case, *Ragland* would be dispositive even if this Court determined that the Secretary has banned discourse on a *topic*—abortion—rather than discriminating against pro-abortion views. Subsidizing programs that discuss prenatal care, but excluding those that discuss abortion as well, violates the content-neutrality command of *Ragland*.

Amici recognize that this content-neutrality principle could conceivably give way to non-viewpoint restrictions

on speech by recipients of public funds where that speech is directly contrary to the compelling purpose of the program at issue. Arguably, public health programs could be restricted to discussing topics *pertinent* to their charge.[17] But patients rely on their physicians and other health care professionals to provide them with *comprehensive* information and counsel regarding their medical options and the medical resources available to them. It is indisputable that the topic of abortion is inextricably bound with prenatal care and family planning. Women seek medical care, assistance and advice from Title X clinics with regard to contraception and a variety of medically related health care needs. Frequently, a patient's initial visit to a Title X clinic is for the purpose of getting a pregnancy test. *Commonwealth of Massachusetts v. Secretary of Health & Human Services*, 899 F.2d 53, 56 (1st Cir. 1990). The topic of abortion is obviously intimately related to the topics of pregnancy and prenatal services about which the patients seek public health assistance. By prohibiting Title X health care professionals and other recipients of public funding from providing their pregnant clients and patients with *any information* about abortion—even in response to direct and specific questions—the Secretary has for reasons extraneous to health care prohibited the discussion of a health care topic that is inextricably related to the speech the program authorizes.

In sum, the Secretary cannot impose content-based restrictions that prohibit health care providers from dispensing medical advice and information to pregnant patients about abortion. Such restrictions on the content of the advice or information that a health care professional may provide are inconsistent with the basic function of the Title X program—to provide medical services, counseling and referral with regard to family planning and related medical conditions such as pregnancy—and, therefore, contravene the First Amendment.

[17] Programs such as libraries that by tradition or dedication have been free from subject matter censorship, however, may not be subjected to legislative limitations on the subjects they address.

III. BY IMPOSING CUMBERSOME AND IN MANY CASES UNREALISTIC REQUIREMENTS OF PHYSICAL SEPARATION BETWEEN PRIVATELY FUNDED PROVISION OF INFORMATION ABOUT ABORTION SERVICES AND PUBLICLY FUNDED FAMILY PLANNING SERVICES, THE REGULATIONS IMPOSE A PENALTY ON PROTECTED SPEECH VIOLATIVE OF THE FIRST AMENDMENT.

It is well-established that government may not deny a subsidy based upon a group's or individual's privately funded expressive activities.[18] Thus, for example, government may not deny public broadcasting funds to local stations that use their own funds to present broadcast editorials, even though government might be permitted to deny public funding for the editorials themselves. *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984); *see Regan v. Taxation With Representation*, 461 U.S. 540, 553 (1983) (Blackmun, J., concurring).

This Court has recognized that, consistent with this principle, government may require recipients of federal funds to segregate their publicly-funded from their

[18] *See FCC v. League of Women Voters*, 468 U.S. 364, 400-01 (1984); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). *Cf. Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (denial of welfare benefits for abortion is constitutional, but an attempt to withhold *all* welfare benefits from one who exercises right to an abortion probably would be impermissible); *Maher v. Roe*, 432 U.S. 464, 474-75 n.8 (1977) (same). Government may, of course, simply decline to subsidize expressive activity, so long as it does not do so in a manner that *penalizes* such activity. *See Cammarano v. United States*, 358 U.S. 498, 513 (1959); *Grove City College v. Bell*, 465 U.S. 555, 575 (1984); *Regan v. Taxation With Representation*, 461 U.S. 540, 553 (1983) (Blackmun., J., concurring).

privately-funded expression, and to require bookkeeping practices to ensure that no federal funds are used for a prohibited purpose. *Regan*, 461 U.S. at 544 n. 6; *see id.* at 553 (Blackmun, J., concurring); *League of Women Voters*, 468 U.S. at 395. But it is crucially important that this refinement, crafted for the convenience of government, not undermine the constitutional rule: measures requiring more expensive and burdensome steps than bookkeeping, like denying the subsidy itself, would impose an undue penalty on that protected, privately-funded expression. *See League of Women Voters*, 468 U.S. at 395; *Regan v. Taxation With Representation*, 461 U.S. at 553 (Blackmun, J., concurring).

In at least two respects, the regulations transgress this rule against penalizing protected expression. Although the regulations permit Title X recipients to engage in the forbidden speech about abortion with private funds, they are unequivocal that "[m]ere bookkeeping separation of Title X funds from other monies is not sufficient." 42 C.F.R. § 59.9. By requiring, in addition, physical separation of privately- and publicly-funded facilities and separate personnel, § 59.9(a-d), the regulations impose expensive burdens on recipients of Title X monies that unconstitutionally force them, if they wish to engage in speech about abortion with private funds, to choose between forfeiting the federal subsidy on the one hand or incurring significant expense on the other.[19]

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[19] *See Commonwealth of Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53, 74 (1st Cir. 1990) ("The practical effect of the regulations is to restrict significantly the ability of the recipient organization to engage in the forbidden counseling, even on its own time with its own money."). Moreover, because federal funds may never amount to 100% of the funds utilized by the Title X program, and often account for only half of the program's operating budget, the regulations prohibit speech about abortion with the privately-contributed private funds. *See* 42 C.F.R. § 59.2 ("Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds,

Indeed, the regulations' unconstitutional effect goes even further than merely *penalizing* Title X recipients for engaging in the disfavored speech; they may make it literally impossible for a recipient to provide abortion counseling or information concerning abortion with private funds to their own patients. If a patient at the Title X facility asks for abortion counseling, information concerning abortion, or referral to a program that provides such counseling or information, the regulations prohibit the recipient from referring that patient even to its own physically separate facility if that facility "principally provides abortions" or would "encourage" or "steer[]" a patient to programs that provide abortion. 42 C.F.R. § 59.8.[20] Thus, although the recipient may say whatever it wishes at its separate facility to anyone who learns of its existence, the recipient may not inform its Title X patient that the information she seeks is available at the separate facility. As this Court observed in *Ragland*, "'[i]t hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him.'" *Ragland*, 484 U.S. at 231, *quoting Regan*, 461 U.S. at 553 (Blackmun, J., concurring); *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 757 n. 15 (1976). Similarly, it hardly answers the Title X recipient's objection to being prevented from communicating with its patient about abortion—or the patient's objection that information she seeks on that subject has been suppressed—that

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grant-related income or *matching funds*.") (emphasis added); *id.* at 59.11(c) ("No grant may be made for an amount equal to 100 percent of the Title X project's estimated costs."); *see also Commonwealth of Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53, 73 n.11 (1st Cir. 1990) ("the government, at oral argument, said that the federal government provides only about 50% of the money supporting federally funded family planning projects").

[20] Such a referral would almost certainly be deemed an "indirect means" of promoting abortion. 42 C.F.R. § 59.8(a)(3).

the Title X recipient would be free to provide that information to other patients at its separate facility.

Because the regulations deny Title X subsidies to programs that use private funds to provide abortion information to patients seeking that information, they violate the fundamental principle that "government may not deny a benefit to a person *because* [that person] exercises a constitutional right." *Regan*, 461 U.S. at 545 (emphasis added).

CONCLUSION

Amici respectfully urge this Court to reverse the judgment of the Court of Appeals for the Second Circuit, and hold that the regulations of the Secretary of Health and Human Services, 42 C.F.R. §§ 59.7-59.10, violate the First Amendment.

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